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In the

Supreme Court of the United States

October Term, 1940

No. 65

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,

Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,

Respondent and Petitioner Below.

BRIEF OF RESPONDENT

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I

OPINIONS BELOW

The first opinion in the Circuit Court of Appeals for the Sixth Circuit was filed on December 5, 1939, and appears in the record, page 66, *et seq.* It is reported in 109 Fed. (2d) 72.

The second opinion of said court has not been reported, but was rendered on March 12, 1940, and is found at page 71 of the record.

II

JURISDICTION

Respondent concedes this court has jurisdiction to review the judgment below.

The date of the judgment to be reviewed is March 12, 1940. (Record, page 71.) The petition for writ of *certiorari* was filed May 6, 1940, and was granted June 3, 1940.

III

SUPPLEMENT TO STATEMENT OF CASE APPEARING IN PETITIONER'S BRIEF

The petitioner's statement of the case is substantially correct. There are, however, certain omissions of pertinent facts to which attention should be called.

After the five cases in question had been removed from the state court and docketed in the federal court, separate answers were filed by Armour and Company in each case, and thereafter an identical stipulation was filed in each case permitting the plaintiff to file an amended complaint without prejudice to the rights of the defendants to move to strike any new matter, said stipulation further providing that the defendants' answers should stand as answers to the amended complaint. Thereafter the plaintiff in each case filed an amended complaint and the defendant, Charles J. Burmeister, filed a separate answer in each case. *All these proceedings*

were prior to the time any motion to remand was filed. (R. 6. paragraphs numbers 12 to 16, inclusive.)

Shortly after the motion to remand in the *George E. Kniess case* was filed, together with an affidavit claiming that he was an alien, Armour and Company filed a motion pursuant to Judicial Code Section 274c (28 U. S. C. A., Section 399) to amend its petition for removal to correctly state the facts in the event it was ascertained that George E. Kniess was an alien. Before any investigation could be made on that question, the District Court, without making any ruling on the question of whether George E. Kniess was an alien or any ruling on the motion to amend in the event that was found to be the fact, entered an order remanding all five cases. (R. 6 and 7, paragraphs numbers 17 and 18.)

The petitioner's statement of the facts is incorrect in regard to the decision of the Supreme Court of Ohio in *Kniess vs. Armour and Company*, 134 O. S. 432. In petitioner's brief (page 6) appears the statement that the Supreme Court of Ohio reversed the lower courts "solely on the ground that the cause should be removed to the federal court because a separable controversy existed." In fact, the judgment against defendant Burmeister was reversed because he was not jointly liable under the law of Ohio, the Supreme Court of Ohio stating in its opinion:

> "* * * Burmeister filed a demurrer on the ground of misjoinder, asserting that there was a want of joint liability. Therefore, the judgment, which was a joint one, cannot stand as to either defendant. See *Stark County Agricultural Society vs. Brenner, supra*, at page 575. * * *" (Page 445.)

IV

SUMMARY OF ARGUMENT

1. Where the State Supreme Court has determined in a tort action that the liability of one defendant is primary and the liability of another defendant secondary, so that a joint judgment cannot be maintained and where after considering the petition for removal of the non-resident defendant, directs the lower court to grant the petition of the non-resident defendant, that determination of fact and law is conclusive upon the parties and cannot be reviewed by the United States District Court on a motion to remand.

2. The power of the petitioner to pass upon the question of whether the respondent and the resident defendant were properly joined in the suits brought by Kniess *et al.*, was barred by the proceedings taken in the state courts, which ripened into a final judgment constituting *res judicata* to which petitioner was required to give full faith and credit (R. S. 905, 28 U. S. C. A. 687).

3. The decision of the Supreme Court of Ohio was reviewable by this court on *certiorari*. (Judicial Code, Section 237, Amended; 28 U. S. C. A. 344.)

4. Petitioner's order of remand in the *George E. Kniess case* denied respondent the right to amend the petition for removal as requested in respondent's motion therefor, pursuant to Judicial Code Section 274c (Mar. 3, 1915, c. 90, 38 Stat. 956; 28 U. S. C. A. 399).

5. The orders of remand entered by petitioner are not reviewable by appeal or error, and being in excess of petitioner's jurisdiction, a writ of mandamus is the proper method of correcting the error.

V

ARGUMENT AND LAW

Propositions 1 and 2 in our summary of the argument are so inter-related that we shall discuss them as one subject, and concisely stated, the propositions are as follows:

1. and 2. Separable Controversy Is Determined by the Laws of the State Where the Action Is Maintained and the Determination of That Fact by the State Supreme Court Fixes the Status of the Parties and the Law Requires the United States District Court to Give Full Faith and Credit to That Judgment.

It has always been held that the law of the state from which removal is sought determines whether the controversy is a separable one.(1) This is admitted by the petitioner. (Petitioner's brief, pages 31 and 32. Also petitioner's brief in support of petition for *certiorari*, page 24.)

It is likewise well settled that the court to which such petition for removal is presented has jurisdiction, in the first instance, to examine the petition for removal of the cause and to deny such removal if it shall appear

(1) *Cincinnati, N. O. & T. P. Rd. Co. vs. Bonn*, 200 U. S. 221, 50 L. Ed. 448, 26 S. Ct. 166;

Chicago & Alton Ry. Co. vs. McWhirt, 243 U. S. 422, 61 L. Ed. 826, 37 S. Ct. 392;

Chicago Rock Island & Pacific Ry. vs. Dowell, 229 U. S. 102, 57 L. Ed. 1090, 33 S. Ct. 684;

Norwalk, Admx., vs. Air-Way Electric Appliance Corp., 87 F. (2) 317, 110 A. L. R. 183.

that the petitioner is not entitled thereto.[2] This is likewise admitted by petitioner. (Petitioner's brief, page 22.)

Kniess *et al.* had a right to litigate the question as to whether the respondent and Burmeister were properly joined, either in the state court or in the federal court. Had they desired to do so, they could have permitted the Common Pleas Court to issue an *ex parte* order of removal. On the other hand, Kniess *et al.* could and in this instance did request and receive a hearing and determination of that question in the Court of Common Pleas and the Court of Appeals for Lucas County, Ohio, and in the Supreme Court of Ohio.

It is the contention of respondent that an adequate state remedy was available to Kniess *et al.* in the state courts and having invoked that and pursued it to final judgment, they cannot escape the effect of that adjudication.

It was the duty of the Supreme Court of Ohio to decide the questions presented to it. That decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, nor subject to revision by the District Court of the United States. It merely left it open to reversal or modification in this court, providing an appropriate and timely proceeding was instituted. Until reversed or modified by this court, the decision of the Supreme Court of Ohio constituted an effective and conclusive adjudication. No court of the United States except the Supreme Court can modify that judgment. This court will compel

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(2) *Burlington C. R. & N. R. Co. vs. Dunn*, 122 U. S. 513, 30 L. Ed. 1159.
Powers vs. C. & O. R. Co., 65 Fed. 129, affirmed 169 U. S. 92, 42 L. Ed. 673.
Missouri K. & T. R. Co. vs. Chappell, 206 Fed. 688.
Miller vs. Soule, 221 Fed. 493.

all courts of the United States to give full faith and credit to that judgment until it reverses or modifies it in the manner authorized by law.[3]

In the brief filed in support of the petition for *certiorari*, it was stated (page 24):

> "* * * We agree that the decision of the Supreme Court of Ohio was *res judicata* on the question of removability, because that question can only be solved on a determination of the substantive law of the State of Ohio with respect to joint liability. * * *"

However, in petitioner's brief on the merits (page 25) it is now contended that the decision by the Supreme Court of Ohio was not *res judicata*, and an attempt is made to distinguish the cases relied on by respondent and the Circuit Court of Appeals.[4]

In chronological order the first case is *Baldwin vs. Iowa State Traveling Men's Assoc.*, 283 U. S. 522, 75 L. Ed. 1244, 51 S. Ct. 517. In this case a suit was instituted in the Missouri state court and removed to the District Court, whereupon the defendant appeared specially and moved to quash and dismiss for want of service. After the hearing, the motion was overruled with leave to plead within thirty days. No plea having been filed, the cause proceeded to judgment. Thereafter, the plaintiff brought suit on the judgment in the District Court for Iowa, and the defendant set up as a defense that it had not been served on the Missouri judgment,

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(3) *Rooker vs. Fidelity Trust Co.*, 263 U. S. 413.

(4) *American Surety Co. vs. Baldwin*, 287 U. S. 156;
Baldwin vs. Iowa State Traveling Men's Assoc., 283 U. S. 522; 75 L. Ed. 1244; 51 S. Ct. 517;
Treinies vs. Sunshine Mining Co., 308 U. S. 66.

and hence the judgment was invalid, etc. The plaintiff objected to proof of such matters, claiming that the judgment on the motion in the first case was *res judicata*. In holding that the first judgment was *res judicata*, the Supreme Court in the opinion by Mr. Justice Roberts said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.
>
> "While this court has never been called upon to determine the specific question here raised, several federal courts have held the judgment *res judicata* in like circumstances. *Phelps vs. Mutual Life Assn.*, 112 Fed. 453; affirmed on other grounds, 190 U. S. 147; *Moch vs. Insurance Co.*, 10 Fed. 696; *Thomas vs. Virden*, 160 Fed. 418; *Chinn vs. Foster-Milburn Co.*, 195 Fed. 158. And we are in accord with this view." (Pages 524, 525, 526.)

The second case is *American Surety Company vs. Baldwin*, 287 U. S. 156. In this case a state court entered a judgment against a surety company without notice to it in violation of the due process clause of the Fourteenth Amendment. The surety company appeared in the state court and made a motion to vacate the judgment. The state court held that it had jurisdiction to enter the judgment, whereupon the surety company filed suit in the federal court for an injunction, claiming that

the action in the state court deprived it of due process of law. In holding that the decision of the state court on the motion to vacate was final and *res judicata*, the Supreme Court of the United States, in the opinion by Mr. Justice Brandeis, said:

> "* * * Since the decision would formally constitute *res judicata* in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction *might have been presented to the State Supreme Court and reviewed here*, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction. Cf. *Fidelity Nat. Bank & Trust Co. vs. Swope*, 274 U. S. 123, 130-131." (Pages 164, 165, 166, 167.) (Italics ours.)

The third case is *Treinies vs. Sunshine Mining Company*, 308 U. S. 66. In that case this court held that a final decree of an Idaho state court of general jurisdiction in a suit to determine the ownership of personal property, awarding the property to the plaintiff and holding that a Probate Court of Washington which had awarded the property to another, under whom the defendant claimed, was without jurisdiction of the subject matter, was, as to the issue of the jurisdiction of the state courts, *res judicata* in a proceeding in the federal court interpleading the same plaintiff and defendant in respect of the same property. The opinion by Mr. Justice Reed concluded:

> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." (Page 78.)

A further illustration of the rule that any matter once litigated is as between the parties *res judicata* is given in *Stoll vs. Gottlieb*, 305 U. S. 165. In this case it appeared that a Federal District Court in a proceeding to reorganize a corporation under Section 77b of the Bankruptcy Act approved a plan of reorganization providing for a discharge of the debtor's bonds and cancellation of a personal guaranty thereof. One of the holders of the guaranteed bonds brought an action in the state court of Illinois upon the guaranty, and while that action was pending, he unsuccessfully petitioned the United States District Court to set aside or modify its order upon the ground that it had no jurisdiction to extinguish the guaranty. This court assumed that the bankruptcy court did not have jurisdiction of the subject matter of its order—the release, in reorganization, of a guarantor from his guaranty. The court, however, held that the question of jurisdiction over the subject matter was raised and decided by the bankruptcy court, and such determination was *res judicata* of that issue in the action pending in the state court. This court, in an opinion by Justice Reed, said:

> "* * * After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." (Page 172.)

The opinion then reviews a large number of prior decisions and refers to the statement sometimes made distinguishing between "strictly jurisdictional facts" and "*quasi* jurisdictional facts." In regard to this distinction the opinion states:

> "* * * We do not review these cases as we base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent. That determination is *res adjudicata* of that issue in this action, whether or not power to deal with the particular subject matter was strictly or *quasi*-jurisdictional." (Page 177.)

The petitioner attempts to distinguish this line of cases by stating that the doctrine of *res judicata* as applied to questions of jurisdiction "* * * is limited to determinations by state or federal courts of their own jurisdiction in the premises, * * *." (Petitioner's brief, page 28.)

We submit that there is nothing in the cases referred to that even inferentially supports this statement. In fact, the *Sunshine Mining Company case, supra,* specifically involves a determination by an Idaho court of the

jurisdiction of a Probate Court of the State of Washington.

There is no logical basis upon which a different rule can be applied in a situation such as is presented in our case from the rule universally followed in all other cases, that an actual contest and determination of an issue is *res judicata.*

The petitioner in his brief discusses several cases that state, even if they do not necessarily hold, that the Federal District Court has a right to determine the removability of a cause independently of the jurisdiction and determination of the state courts. (Petitioner's brief, page 23, *et seq.*)

As stated by this court in *Webster vs. Fall,* 266 U. S. 507:

> "* * * We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. See *New vs. Oklahoma,* 195 U. S. 252, 256; *Tefft, Weller & Co. vs. Munsuri,* 222 U. S. 114, 119; *United States vs. More,* 3 Cr. 159, 172; *The Edward,* 1 Wheat. 261, 275-276. * * *" (Page 511.)

In not a single case referred to by the petitioner is there any mention or discussion of the applicability of the requirement that the court give full faith and credit to the judgment of the state court. (R. S. 905, 28 U. S. C. A. 687.) The confusion resulting from the rule con-

tended for by the petitioner is demonstrated in the opinions of virtually all of the cases petitioner cites in support of his contentions. Such confusion and the apparent conflict between the statutes in question should be eliminated by this court. We submit that it is vastly more important that the federal courts give full faith and credit to the judgments of the state courts, and that a matter once litigated be foreclosed forever, than it is to preserve any supposed privilege in the federal court to make a re-examination of a question that is admittedly determined by the state law and which has been properly submitted to the state courts for determination.

One of petitioner's contentions (petitioner's brief, pages 32 and 33) is that while the petitioner is subject to the same limitations as the state court in deciding whether or not "the cause was improperly removed" under Section 28 of the Judicial Code, Section 37,

> "• • • the power of the Federal District Court to enforce its jurisdictional limitations is by contrast unlimited • • • so that if it appears to the satisfaction of said court at *any time after* such suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, said court must proceed no further therein, but must dismiss or remand the suit to the court from whence it was removed. • • •" (Petitioner's brief, page 33.)

A reading of the cases the petitioner cites in support of the foregoing statement demonstrates that he is limited to a factual inquiry of either the amount in dispute or the citizenship of the parties as those facts existed *at the time of removal* and not, as stated by the petitioner,

as those facts exist "at any time after such suit has been removed."

It is well settled that the federal court does not lose jurisdiction once it has attached, even though the plaintiff may amend to reduce his claim below the jurisdictional amount;[5] the plaintiff dismisses the case after the defendant has filed a counterclaim below the juristional amount;[6] the residence of the parties is changed or a substitution is made so that the requisite diversity of citizenship no longer exists;[7] the plaintiff files an amended pleading which would not have warranted a removal originally;[8] or even if it appears from the original petition that the defendant has a valid defense on the merits if asserted.[9]

Obviously the result of the case does not affect or determine the jurisdiction of the federal court. If it did, the court could never enter a judgment for the plaintiff for less than $3,000 and could never enter a judgment for the defendant, but would always be required to remand the cause to the state courts.

The result is, as pointed out by this court in the case

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(5) *Kanouse vs. Martin*, 15 How. 198;
St. Paul Indemnity Co. vs. Cab Co., 303 U. S. 283.

(6) *Kirby vs. American Soda Fountain Co.*, 194 U. S. 141, 146.

(7) *Morgan's Heirs vs. Morgan*, 2 Wheat. 290, 297;
Mollan vs. Torrance, 9 Wheat. 537;
Dunn vs. Clarke, 8 Pet. 1;
Clarke vs. Mathewson, 12 Pet. 164;
Phelps vs. Oaks, 117 U. S. 236;
Hardenberg vs. Ray, 151 U. S. 112;
Wichita R. & Light Co. vs. Public Utitlities Comm'n, 260 U. S. 48.

(8) *Pullman Co. vs. Jenkins*, 305 U. S. 534, 537.

(9) *Interstate B. & L. Ass'n. vs. Edgefield Hotel Co.*, 109 Fed. 692;
Armstrong vs. Walters, 219 Fed. 320;
Mullins Lumber Co. vs. Williamson & Brown Land Co., 246 Fed. 232.

of *Employers Corporation vs. Bryant,* 299 U. S. 374, Sections 28 and 37 of the Judicial Code are in *pari materia* and should be construed together. The right to removal of a separate suit or a separable controversy depends solely upon the allegations of the petition at the time the removal is sought. A determination by the District Court whether "the cause was improperly removed," under Section 28 of the Judicial Code, or a determination by the District Court whether "such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court," under Section 37 of the Judicial Code, involve precisely the same questions.

The petitioner contends (pages 38, *et seq.* of petitioner's brief), "The Petitions for Removal Were Insufficient to Warrant a Removal on the Ground of Separable Controversy." This unquestionably merely involves a review of the decision by the state courts which the petitioner conceded in his brief in support of his petition for *certiorari* to be *res judicata.* (See page 24 of that brief.)

The petitioner argues that the petitions for removal were defective because they did not in terms state that "a separable controversy" existed. The existence of a separable controversy or of a separate suit which entitled Armour to remove was dependent entirely upon the allegations of the plaintiff's petition, and it is well settled that the petition for removal should only include statements of fact not already appearing on the record.(10)

(10) *Chesapeake & Ohio Railroad vs. Cockrell,* 232 U. S. 146.

3. The Decision of the Supreme Court of Ohio was Reviewable by This Court on Certiorari. (Judicial Code, Section 237, Amended; 28 U. S. C. A. 344.)

It is the petitioner's contention (petitioner's brief, pages 41-43) that the judgment rendered by the Supreme Court of Ohio, directing the Court of Common Pleas of that state to grant the respondent's petition to remove these causes to the District Court of the United States, was not reviewable by this court on *certiorari*. The petitioner admits that if the Ohio courts had "* * * refused to permit the respondent to remove the case to the Federal District Court, then there would have been a denial of a federal right. * * *"[11] However, the petitioner argues that because the federal claim was sustained, the judgment of the Supreme Court of Ohio was not subject to review by this court on writ of *certiorari*.

We submit that the petitioner's argument is completely answered by the express phraseology of the statute in question, as it is specifically provided that "* * * the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied. * * *"[12] It is equally apparent

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(11) *Chesapeake & Ohio Ry. Co. vs. McCabe*, 213 U. S. 207; *Cincinnati & Texas Pacific Ry. Co. vs. Bohon*, 200 U. S. 221; *Missouri, Kansas & Tex. Ry. Co. vs. Missouri Rd. & Warehouse Commissioners*, 183 U. S. 53.

(12) Judicial Code, Section 237, amended; 28 U. S. C. A. 344:

* * * * * *

"(b) It shall be competent for the Supreme Court, by *certiorari*, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States;

that the asserted right of Kniess *et al.* to prevent removal of the cases from the state courts to the federal court was a "* * * right, privilege, or immunity * * * claimed by either party under the Constitution * * * or statute of * * * the United States; * * *" *i.e.*, Judicial Code, Section 28, Amended (28 U. S. C. A. 71).

Since the decision of the Supreme Court of Ohio might have been reviewed by the Supreme Court of the United States, that decision was a bar to the petitioner's attempt to re-examine the question decided by the state court.[13]

4. Petitioner's Order of Remand in the George E. Kniess Case Denied Respondent the Right to Amend the Petition for Removal as Requested in Respondent's Motion Therefor, Pursuant to Judicial Code Section 274c. (March 3, 1915, c. 90, 38 Stat. 956; 28 U. S. C. A. 399).

The effect of the claim that one of the plaintiffs is an alien is involved only in the *George E. Kniess case* and is not involved in the other four cases.

George E. Kniess filed an affidavit stating that by neglecting to secure his second papers he was technically still an alien and a subject of Germany. Like all

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or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on *certiorari* under this paragraph."

(13) *American Surety Co. vs. Baldwin, supra*, note 4.

the affidavits this was filed after respondent had answered in the District Court, a stipulation signed by all parties had been filed, and an amended petition filed by Kniess *et al.* In reply to this affidavit, respondent stated that it would check the citizenship of George Kniess and, pursuant to Judicial Code Section 274c, 28 U. S. C. A. 399, file its motion to amend its petition for removal if it were proven that George Kniess was in fact an alien. Before any check could be made by respondent with the Department of Labor regarding Kniess' citizenship, the petitioner, without any finding on the question, or reference to it or to respondent's motion to amend, ordered all five cases remanded.

Assuming for the sake of argument that Kniess' alleged citizenship had any bearing on the petitioner's order in this one case, which respondent does not concede, the respondent's rights to amend are secured by Judicial Code 274c, which provides:

> "Wherein any suit brought in or removed from any state court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal."

The question how the rights granted by the above statute, first enacted in 1915, are to be enforced had never been passed upon prior to the decision of the Court of Appeals in this case. Obviously, if an amendment is refused and the case dismissed, the error could be corrected by an appeal. When, as in our case, the motion to amend is ignored and the cause remanded, the only method of enforcing the right secured by this statute is by a writ of mandamus. We submit that if any conflict exists between Judicial Code 274c and Judicial Code Sections 28 and 37, the provisions of Judicial Code 274c should prevail, as it was more recently enacted.

Assuming Kniess to be an alien (and petitioner has never made any finding in regard to that question) under the decision of the Supreme Court of Ohio, the *George Kniess case* against respondent was a separate and distinct suit from his case against defendant Burmeister, and properly removable to the District Court.

We agree that a cause cannot be removed on the ground of separable controversy when the plaintiff is an alien. However, it is well settled that where the plaintiff has joined in the same petition a separate suit against one defendant with a separate and distinct suit against another defendant, either separate suit may be removed on the grounds of diversity, whether the plaintiff is an alien or a citizen.(14)

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(14) *Lucania, etc., vs. U. S. Corporation*, 15 Fed. (2d) 568;
Stewart et al. vs. Nebraska Tire & Rubber Co., 39 Fed. (2d) 309;
Tillman vs. Russo Asiatic Bank, 51 Fed. (2d) 1023;
Hammer et al. vs. British Type Investors, Inc., 15 Fed. Supp. 497;
Rogge vs. Michael Del Balso, Inc., 15 Fed. Supp. 499;
Young vs. Southern Pacific Co., 15 Fed. (2d) 280.
The foregoing cases hold that a right of removal exists as to a "sep-

The distinction between a separable controversy and a separate suit had no significance until one of the plaintiffs claimed to be an alien. However, the Supreme Court of Ohio held in the *Kniess case* that two separate suits had been improperly combined in the petition and in fact reversed as to the defendant Burmeister, solely on the ground that his demurrer for misjoinder of parties should have been sustained. The holding by the Supreme Court of Ohio in the *Kniess case* is discussed somewhat further in *Losito vs. Kruse, Jr.*, 136 O. S. 183 (decided January 3, 1940). After citing the *Kniess case* and several others, the court said at page 187:

> "* * * In such case *there can be no joinder in a single action* of the party primarily liable and the party secondarily liable because there is no joint liability. If they are joined in an action and this relationship appears on the face of the petition it is demurrable for misjoinder of parties defendant. If it does not appear on the face of the petition but develops from the evidence on the trial, the plaintiff may, on motion, be required to elect as to which one of the two he will pursue, dismissing the other from the action, but not necessarily from the claim. *Canton Provision Co. vs. Gauder, supra; Bello vs. City of Cleveland, supra; Morris vs Woodburn, supra; Village of Mineral City vs. Gilbow, supra; French, Admr., vs. Central Construction Co.*, 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. (N.S.) 669; *City of Rochester vs. Campbell*, 123 N. Y. 405, 25 N. E. 937; *City of Chicago vs. Robbins*, 67 U. S. (2 Black) 418, 17 L. Ed. 298."

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arate suit" even though it is permissible under the state practice to join it in the same petition with a "non-removable suit."

It necessarily follows that the right to remove exists in the five cases against Armour where the joinder in the same petition of the claims against Burmeister is not under the Ohio law permitted.

In other words, had the cases remained in the state court, the plaintiffs would be required to file a separate petition against Armour and a separate petition against Burmeister[15] under the provisions of Ohio General Code 11312, which provides:

> "Procedure if causes are misjoined. When a demurrer is sustained on the ground of misjoinder of several causes of action, on motion of the plaintiff the court may allow him, with or without costs, to file several petitions, each including such of the causes of action as might have been joined; and an action shall be docketed for each of the petitions, and be proceeded in without further service."

What has been our contention in the past, and will be our contention in the future, is sensed by the opinion of the Court of Appeals where it is stated:

> "* * * It is somewhat difficult to understand why the plaintiff in the action should seek to remand the case to a State Court already foreclosed from its consideration by the mandate of the Supreme Court of Ohio to which it must bow. * * *" (109 Fed. (2d) 72, pages 75-76.)

Entirely off the record the petitioner discusses the right of Kniess *et al.* to amend in the state court. This is misleading as petitioner neglects to state that Kniess *et al.* have unsuccessfully attempted to amend in the Supreme Court of Ohio both before and after petitioner's purported order of remand, and likewise unsuccessfully attempted to amend in the Common Pleas Court of Lucas County. We know no rule of law that would warrant the Court of Common Pleas of Lucas

(15) *Compare McGowan vs. Rishel*, 125 O. S. 77, 80.

County, Ohio, in disregarding the mandate of the Supreme Court of Ohio upon the order of the petitioner.

5. The Orders of Remand Entered by Petitioner are Not Reviewable by Appeal or Error, and Being in Excess of Petitioner's Jurisdiction, a Writ of Mandamus Is the Proper Method of Correcting the Error.

The respondent concedes that an order of remand by a District Court is not reviewable by appeal or writ of error and likewise concedes that the usual order of remand following an original determination of the question by the District Court is not reviewable by way of a writ of mandamus.[16]

It is the contention of Armour in the instant case that the action of the District Court went beyond the usual order of remand, in that the District Court purported to make a determination of a matter that had already been submitted to and passed upon by the state courts, and that the order of the District Court in effect refused to give full faith and credit to the decisions and orders of the state courts.

After an extended search, we have been unable to find any case precisely identical with our case, where the courts have either granted or refused a writ of mandamus to compel a District Court to set aside an order of remand, on the ground that the matter had been previously passed upon and decided by the state courts. This is not particularly surprising, as it would be extremely rare for the federal courts to disregard a decision of the state courts upon a question where the state law is admittedly conclusive.

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(16) *Employers Reinsurance Corporation vs. Bryant*, 299 U. S. 374, 378-381.

However, we have found two cases where the federal courts have issued an order of mandamus to the District Courts where the order of remand in the lower courts involved something more than a mere remand of the case.

The leading case on that question is *In re Metropolitan Trust Company* (1910), 218 U. S. 312. In this case it appeared that a suit had been brought against the Trust Company and others in the state courts of New York, which suit was thereafter removed to the federal court on the ground that there was a separable controversy. The complainant moved to remand the cause, which motion was denied. After the removal the Trust Company demurred. The United States District Court sustained the demurrer and dismissed the complaint as to the Trust Company. The other defendants then answered, and after a final decree in the defendant's favor was entered, the complainant appealed to the Circuit Court of Appeals, but did not seek a review of the decree dismissing the Trust Company.

The Circuit Court of Appeals decided that there was not a separable controversy and that the motion to remand should have been granted. After the order of remand was entered in the Circuit Court, the complainant moved to vacate the decree and remand the cause as to the Trust Company, which motion the court granted. The Trust Company then applied to the Supreme Court for a writ of prohibition and mandamus. In granting the writ of mandamus, the Supreme Court, in an opinion by Justice Hughes, said:

> "• • • After the term had expired, and after the complainant had exercised his right of appeal to procure a review of the errors of which he

desired to complain, it was sought to set aside a decree which stood unreversed and by which the Trust Company had been dismissed from the cause.

"To reach this result the Circuit Court asserted the power to vacate the decree upon the ground that it had been rendered without jurisdiction; and the court held that it must be treated as a nullity. But the decree cannot be so regarded unless the court, upon the motion to remand, was without jurisdiction to determine whether a separable controversy existed, and hence not merely committed error but exceeded its authority. The decree was not a nullity unless the order refusing to remand was a nullity; and the latter contention was negatived by the decision of this court upon the application for a writ of mandamus in *In re Pollitz, supra.* The reversal by the Circuit Court of Appeals of the final decree as to the other defendants, and its direction to remand, did not make the decision of the court of first instance any the less 'a judicial act, and within the scope of its jurisdiction and discretion;' and as that reversal and direction did not affect the Trust Company the decree in its favor remained in full force." (Pages 320, 321.)

The foregoing case was recently followed in an identical case by the 4th Circuit Court of Appeals, in *Windholz vs. Everitt* (C. C. A. 4, 1935) 74 Fed. (2d) 834.

Another case that recognizes the reviewability of an order of a District Court which remands a case but goes beyond the usual order of remand is *Waco vs. U. S. F. & G. Co.*, 293 U. S. 140. In this case, after removal, the District Court dismissed a cross action and remanded the case to the state court. This court held that the order dismissing the cross action, if not

reversed or set aside, was conclusive and appealable. In the course of the opinion, at page 143, the court said:

> "* * * True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner."

A case that distinctly states the rule for which we are contending is *Wiley vs. Judge of Allegan Court*, 29 Mich. 488, at page 495 where the court says:

> "* * * The true principle upon which a majority of the cases may be reconciled is that if the inferior court has acted judicially in the determination of a question of fact, or a question of law (at least if the latter be one properly arising upon the case itself, and not some collateral motion or matter—that is, if the case or proceeding before it, upon the facts raised the particular question in such shape as to give the power judicially thus to determine it) then such determination however erroneous cannot be reviewed. * * * But if the case before the lower court does not, upon its facts or the evidence, legitimately raise the question of law or fact it has assumed to decide, so that the court could act judicially upon it, or so as to give the court the power judicially to make the decision it has assumed to make, then its action is not properly judicial and no assumed determination of it, nor any order resting upon it, will preclude the remedy by mandamus. * * *"

The foregoing decision is peculiarly appropriate to our case. We contend, as is so clearly pointed out in that case, that the District Court improperly assumed to decide a question that was not, on the record before

the District Court, presented to it for determination. In other words, we do not seek a review of the correctness or incorrectness of the court's decision but claim that the question was not open for decision as it had previously been litigated by the adverse parties and decided by the Supreme Court of Ohio.

The mere form of the application made to the District Court does not determine the issue decided. The question before this court is not whether mandamus is proper to review an order made in response to a petition designated as a motion to remand, but whether a District Court of the United States has power to review a decision of the Supreme Court of Ohio and in the attempted exercise of that power divest itself of jurisdiction of a controversy committed to it under the laws of the United States. Mandamus is the appropriate remedy where the District Court asserts a power it does not have.(17)

Moreover, the question was not before the District Court for the further reason that Kniess *et al.* had filed amended complaints in the District Court and entered into stipulations (see paragraphs Nos. 13 and 14 of petition for writ of mandamus), thereby waiving any formal defects in the petition for removal. The Supreme Court of the United States has held that such action waives any formal defects. The case we refer to is *In re Moore,* 209 U. S. 490, the first headnote in this case being as follows:

> "In either case, the filing by the defendant of a petition for removal, the filing by the plaintiff

(17) *Metropolitan Trust Co.,* 218 U. S. 312;
Windholz vs. Everitt, 74 Fed. (2d) 834.

after removal of an amended complaint or the giving of a stipulation for continuance, amounts to the acceptance of the jurisdiction of the Circuit Court."

As we have pointed out, the question was not presented for determination to the District Court for two reasons. First, the question had previously been determined by the Supreme Court of Ohio, and second, the proceedings taken by Kniess *et al.* in filing amended complaints and entering stipulations in the District Court waived any formal defects in the petitions for removal.

Petitioner suggests that his jurisdiction was terminated when he sustained the motion to remand and that he is now without authority to vacate the orders to remand and "execute the mandate of the United States Circuit Court of Appeals." In support of that contention, petitioner refers to *Ausbrooks vs. Western Union Telegraph Co.*, 282 Fed. 733, decided by the District Court, M. D., Tennessee, Nashville Division, July 19, 1921, but an examination of that case discloses that the court did not consider the question of whether it had authority to vacate the orders previously entered and "execute the mandate of the United States Circuit Court of Appeals." Petitioner's contention in this respect is in effect an assertion of power in the District Court to determine whether it shall execute the mandate of the United States Circuit Court of Appeals.

VI

CONCLUSION

The question is whether it is more important to preserve a supposed privilege in the District Court to make a re-examination of a question that is admittedly determined by the state law and which has been properly submitted to and determined by the state courts, or whether, as we contend, it is more important that the federal courts give full faith and credit to the judgments of the state courts, and that a matter once litigated be foreclosed forever.

We submit that the decision of the United States Circuit Court of Appeals in this case accords full faith and credit to the judgment of the Supreme Court of Ohio; assures all parties a full hearing and fair determination of their contention touching upon a respondent's right to remove these cases to the District Court of the United States; and preserves the mutual comity and respect that should exist between the state and federal courts.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 65.—October Term, 1940.

Frank L. Kloeb, Judge of the District Court of the United States for the Northern District of Ohio, Western Division,

vs.

Armour & Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 9, 1940.]

Mr. Justice McReynolds delivered the opinion of the Court.

Respondents, Armour & Company, a Kentucky corporation, by petition obtained from the Circuit Court of Appeals, Sixth Circuit, an order directing the U. S. District Judge, Northern District of Ohio, to set aside the remands of five separate actions. The opinion of the Court made the following statement concerning the basic issue.

"A number of persons, including George E. Kniess, brought suit against Armour and Company in the Court of Common Pleas of Lucas County for damages claimed to have been suffered in the consumption of food products, materials for which were prepared by Armour and Company, but which were processed by a retailer in Toledo by the name of Burmeister. In each of the five cases, and upon identical petitions, the plaintiffs joined Burmeister as a defendant on the theory that he and the Armour Company were joint tortfeasors. Armour and Company filed its petitions for removal with the Court of Common Pleas accompanied by proper removal bonds. Its petitions were contested by the plaintiffs and were denied. The Kniess case proceeded to trial while the other cases were held in abeyance and it eventually reached the Supreme Court of Ohio, 134 O. S. 432. That court disposed of the case upon the sole ground that the removal petition should have been allowed, because a separable controversy existed as between plaintiff and Armour. It stated the law of Ohio to be that where the responsibility of two tortfeasors differs in degree and in nature, liability cannot be joint and the alleged torts are not concurrent. Holding that the defendant Armour and Company had adequately preserved its exceptions to the ruling of the lower court, the cause was reversed and remanded to the Court of Common Pleas with instructions to grant the removal petition, and the mandate directed the Court of Com-

mon Pleas to remove the cause to the District Court of the United States.

"When the case came before the respondent the plaintiff moved to remand and, notwithstanding the adjudication by the Ohio Supreme Court which had become final, the respondent proceeded to take evidence upon the question of a separable controversy, decided there was none, that the cause was not removable under the statute, entered an order to remand the case to the Court of Common Pleas of Lucas County, and denied petitions for rehearing."

The District Judge rendered no opinion to support his actions; but responding to the rule from the Circuit Court of Appeals to show cause, he cited *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, referred to affidavits filed in support of the motions and said that upon consideration of the entire record, he became satisfied that none of the five suits "really and substantially involved a dispute or separable controversy wholly between citizens of different states which could be fully determined as between them, and therefore none of said causes were within the jurisdiction of the District Court of the United States, and further that plaintiff Kniess is an alien."

Title 28, U. S. Code provides—

"Section 71—Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

"Section 80—If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

Employers Corporation v. *Bryant*, 299 U. S. 374, 380, 381, says of these sections: "They are in pari materia, are to be construed accordingly rather than as distinct enactments, and, when so construed, show, as was held in *Morey* v. *Lockhart*, 123 U. S. 56, 58,

that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter."

The Court below concluded: "The District Court had no power to determine the issue of separable controversy entitling the petitioner to remove because that issue had already been adjudicated by the Supreme Court of Ohio, and the District Court, upon familiar principles, was bound by such adjudication."

And it said—"It would seem that in the use in Section 71 of the words 'the district court shall decide,' and in the employment in Section 80 of the phrase 'it shall appear to the satisfaction of the said district court,' it was within the contemplation of the Congress that the statute should apply to those cases in which there was some issue which, as a matter of primary decision, was submitted to the District Judge. It certainly could not have been intended to apply to decision of a question which was not properly at issue before the District Judge since it had already been adjudicated by the Supreme Court of Ohio in the same proceeding, between the same parties, and upon the plaintiff's petition. To hold otherwise would be to permit the District Court to defy the statute 28 U. S. C. A. § 687, which provides: 'The records and judicial proceedings of the courts of any State . . . shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.'"

Also—"The decision in *Employers Reinsurance Corporation* v. *Bryant, District Judge, supra,* and in *Re Pennsylvania Company, supra,* must not, in our judgment, be extended beyond the situations requiring the application of the rule there announced, that is to say, to cases where the issue of the petition to remand called for original and primary decision by the District Court unfettered by the doctrine of res judicata or the mandate of the 'full faith and credit' statute."

"That the decision of the Ohio Court was res judicata notwithstanding the issue was one involving the jurisdiction of a federal Court, is settled by *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A. L. R. 298; *Baldwin* v. *Iowa State Traveling Men's Ass'n,* 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244, and the decision in *Evelyn Treinies, Petitioner,* v. *Sunshine Mining Co., et al.,* 60 S. Ct. 44, 84 L. Ed. —, announced as recently as November 6, 1939.

"While the precise question here involved is one of first impression, the Supreme Court in *Re Metropolitan Trust Company,* 218 U. S. 312, 31 S. Ct. 18, 54 L. Ed. 1051, has drawn the distinctions be-

tween orders to remand erroneously issued and those issued by a District Judge in excess of his authority. The former may not be challenged by appeal or writ of mandamus—the latter are a nullity. We think it follows that under general supervisory powers they may be set aside."

We cannot accept the conclusion of the Circuit Court of Appeals. It derives from an inadequate appraisal of the record and of sections 71 and 80 U. S. Code, *supra*.

These sections were designed to limit possible review of orders remanding causes and thus prevent delay. *In re Pennsylvania Co.*, 137 ~~143~~ U. S. 451, 454. They entrust determination concerning such matter to the informed judicial discretion of the district court and cut off review.

In this cause the district judge weighed the petitions and relevant affidavits and concluded that the controversy was not within the jurisdiction of that court. His clear duty was to proceed no further and to dismiss or remand the causes. The statute exempted his action from review.

The suggestion that the federal district court had no power to consider the entire record and pass upon the question of separability, because this point had been finally settled by the Supreme Court of Ohio, finds no adequate support in the cases cited by the opinion below: *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, *American Surety Company* v. *Baldwin*, 287 U. S. 156 and *Treinies* v. *Sunshine Mining Company*, 308 U. S. 66. None of these causes involved a situation comparable to the one here presented.

Section 72, Title 28, U. S. Code, provides the requisites for removing causes from state to federal courts and directs that when complied with, the state court shall proceed no further. The Supreme Court of Ohio declared: "In passing upon the question of removal, unfortunately we are limited solely to a consideration of the facts stated in the petition." It held that upon them the trial court should have relinquished jurisdiction.

The causes went to the federal district court and additional facts were there presented. As required by the statute, that court considered all the relevant facts, petitions and affidavits, exercised its discretion and ordered the remands. Jurisdiction to decide, we think, is clear; the Circuit Court of Appeals lacked power to review the remand.

The challenged order must be reversed.